Court of Appeals No. 56498-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington, Respondent

v.

Timothy Michael Foley, Appellant

Kitsap County Superior Court No. 20-1-00277-0

The Honorable Judges Jennifer Forbes and Mathew Clucas

Appellant's Reply Brief

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I. THE FIRST SEARCH WARRANT RESTED IN PART ON AN UNCONSTITUTIONAL STATUTE.

Police obtained two warrants to search Mr. Foley's phone. The first warrant was based (in part) on an allegation of cyberstalking under former RCW 9.61.260 (2019). CP 17, 20-33. A federal court has found the applicable provision "facially unconstitutional."[1] *Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 972 (W.D. Wash. 2019); *see* Appellant's Opening Brief, pp. 15-19.

Because the warrant rests (in part) on an unconstitutional statute, it was issued without the "authority of law" required by Wash. Const. art. I, §7.

Respondent misunderstands the problem. Respondent's argument focuses on particularity. Respondent's Brief, pp. 9-10.

The unconstitutionality of the statute does not raise a particularity problem. A warrant cannot authorize police to

[1] The statute has since been amended and recodified as RCW 9A.90.0002 (Cyber harassment).

search for an object, no matter how well described, if they are seeking evidence of a nonexistent crime.

Here, the relevant part of the statute is unconstitutional. Thus, police sought Mr. Foley's cellphone (in part) to show that he had committed a nonexistent crime. The warrant could not provide "authority of law." Wash. Const. art. I, §7.

Next, Respondent erroneously suggests that a limiting construction has made the statute constitutional. Respondent's Brief, pp. 11-13 (citing *State v. Mireles*, 16 Wn.App.2d 641, 655, 482 P.3d 942, *review denied,* 198 Wn.2d 1018, 497 P.3d 373 (2021)).

Respondent does not mention that the validity of a search rests on the law at the time of the search. *State v. Afana*, 169 Wn.2d 169, 183, 233 P.3d 879 (2010). The *Mireles* court's subsequent limiting construction cannot provide probable cause at the time of the search. *Id.*

In *Afana,* the Supreme Court addressed the validity of a warrantless arrest based on a statute later found to be unconstitutional. *Id.*, at 183. The court made clear that probable cause is to be assessed at the time of the seizure. *Id.*

The search in this case was conducted after *Rynearson* but before *Mireles.* At the time of the search, the relevant portion of the statute was facially unconstitutional and had not yet been saved by a limiting construction. The limiting construction imposed by *Mireles* cannot save the search here.

Respondent next attempts to cure the warrant by noting the absence the word "embarrass" in the affidavit. Respondent's Brief, pp. 13-14 (citing *Mireles*). The word "embarrass" was central to the *Rynearson* court's finding that the statute was invalid.

The State's argument conflates the authority of law necessary for a search with the validity of a subsequent conviction. A valid conviction may stem from a verdict based on proper instructions. *Compare State v. Schaler,* 169 Wn.2d 274, 287, 236 P.3d 858 (2010) with *State v. Locke*, 175 Wn. App. 779, 800, 307 P.3d 771 (2013). There are no instructions to cure an invalid warrant.

Finally, Respondent argues that "[T]he warrant stands on the probable cause for the crime of disclosing an intimate image." Respondent's Brief, p. 16 (referencing RCW

9A.86.010). Even if this were true, the "revenge porn" allegations cannot justify the search for information relating solely to the cyberstalking investigation.

For example, the warrant includes a broad authorization to search Mr. Foley's "internet history" and a narrower authorization to search for "internet history regarding Xvideos.com." CP 17. The latter relates to claims that Mr. Foley posted intimate images to Xvideos.com. By contrast, the unlimited search of Mr. Foley's "internet history" apparently stemmed from the cyberstalking investigation.

The cyberstalking allegation does not provide any support for the warrant. At the time of the search, the statute criminalizing cyberstalking had been declared facially unconstitutional. The limiting construction adopted by *Mireles* was not imposed until after the search was completed.

Allegations of cyberstalking did not provide any "authority of law" for the search. Wash. Const. art. I, §7.

II. BOTH SEARCH WARRANTS ALLOWED POLICE TO SEARCH FOR ITEMS IMPRECISELY DESCRIBED AND UNSUPPORTED BY PROBABLE CAUSE.

Both search warrants were overbroad. *See* Appellant's Opening Brief, pp. 19-46. The first warrant authorized police to search for items that were not supported by probable cause. Appellant's Opening Brief, pp. 23-32. Both search warrants failed to describe items with sufficient particularity. Appellant's Opening Brief, pp. 33-46. These failures require suppression of the evidence.

A. The first search warrant was not supported by probable cause.

1. The cyberstalking allegations did not supply probable cause.

As outlined above and in the opening brief, the cyberstalking allegation was based on an unconstitutional statute. It could not provide probable cause to search for the phone or for any information on it. Appellant's Opening Brief, pp. 15-19.

Furthermore, even if the statute were constitutional, the allegations in the affidavit do not suggest that Mr. Foley

committed cyberstalking. Contrary to Respondent's assertion, a search warrant affidavit must address each element of a crime; otherwise, there is no crime to justify the search. Respondent's Brief, p. 20.

The warrant affidavit must suggest "that the defendant is probably involved in criminal activity and that evidence of the crime may be found" at the place to be searched. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). This requires some evidence relating to each element.

For example, evidence that Mr. Foley sent an email to Richardson, by itself, would not justify a search. Only if the other elements of a crime are mentioned (with some supporting evidence) can the warrant provide authority of law.

The warrant itself need not target evidence that will establish every element of the offense. However, the affidavit must include some evidence showing a likelihood of "criminal activity." *Id.*

Cyberstalking - email and Facebook message. Neither the email to Richardson nor the Facebook message to Worel

met the definition of cyberstalking.[2] Former RCW 9.61.260 (2019). First, the email and the Facebook message were not themselves "lewd, lascivious, indecent" etc. under former RCW 9.61.260(1)(a) (2019).

Second, the email to Richardson was not anonymous; nor were there repeated communications with Richardson. *See* former RCW 9.61.260(1)(b) (2019). Although the Facebook message to Worel was anonymous, it was seemingly sent to embarrass Richardson, and thus did not qualify as cyberstalking under any constitutional provision of the statute. *See Rynearson* 355 F. Supp. 3d at 972.

Third, neither the email nor the Facebook message contained a threat of injury. Thus, the email and the Facebook message did not qualify as cyberstalking under the third alternative prong of the statute. *See* former RCW 9.61.260(1)(c) (2019).

Accordingly, the email to Richardson and the Facebook message to Worel did not show that Mr. Foley was "probably

[2] Respondent suggests that the videos posted to Xvideos.com qualify as cyberstalking under this provision. This argument is addressed below.

involved in" cyberstalking." *Id.* They do not provide probable cause to seize the phone or to search it for "internet history," the specified Facebook messenger activity, any videos and images of Richardson or Jones, or data indicating dominion and control. CP 17.

Cyberstalking - explicit videos posted to the internet. Respondent's next argument relates to Mr. Foley's alleged disclosure of intimate images. Respondent suggests that the alleged disclosures amount to cyberstalking. Respondent's Brief, pp. 20-21.

In making this argument, Respondent assumes that posting something on a public website is a communication "to a third party." Respondent does not cite any cases establishing that a public website qualifies as "a third party." Respondent's Brief, pp. 20-21. Where no authority is cited, this court should presume that counsel found none after diligent search. *See City of Seattle v. Levesque*, 12 Wn.App.2d 687, 697, 460 P.3d 205 (2020).

Cyberstalking – scope of the warrant. The affidavit does not show evidence of criminal activity in the form of

Cyberstalking. It cannot justify seizure of Mr. Foley's "internet history," any records of Facebook messenger activity, any images or videos, anything relating to Xvideos.com, anything relating to dominion and control, or a search through any app used for location sharing or geofencing. *See* Appellant's Opening Brief, pp. 24-28.

2. The allegation that Mr. Foley disclosed intimate videos does not provide probable cause for some items described in the warrant.

The affiant alleged that Mr. Foley uploaded intimate videos and pictures of Richardson and Jones. CP 21-26. The allegations suggest that Mr. Foley may have been involved in criminal activity under RCW 9A.86.010, the "revenge porn" statute.

However, those allegations could not support a broad search through Mr. Foley's "internet history" or of apps that collect location sharing or geofencing data. CP 17. Nor do the allegations support a search for or seizure of non-sexual videos and images. CP 17; *see* Appellant's Opening Brief, pp. 28-29.

Instead, at most, the affidavit provided probable cause to search for images and data relating to the Xvideos.com profile, internet history regarding Xvideos.com, and data indicating dominion and control. CP 17.

3. The first warrant was based on stale information.

Mr. Foley's alleged criminal activity occurred in May of 2019. CP 20-33. Police seized and searched his phone in December of 2019. CP 20-33. The information supporting the search was stale when police obtained the first warrant. Appellant's Opening Brief, pp. 29-32.

Respondent attempts to justify the delay by arguing that the police took that much time to investigate the allegations. Respondent's Brief, p. 25. But Respondent does not point to facts showing that the police worked diligently to complete the investigation within a reasonable time. The warrant affidavit suggests they did not. CP 20-33. Furthermore, under the State's argument, any delay can be justified by slow policework, no matter how stale the allegations are.

Respondent also suggests that the delay was justified because "[t]he victim alleged continuing harassment."

Respondent's Brief, p. 25. This is misleading. It was in May—at the start of the investigation—that Richardson said the contact had continued despite her efforts to stop it. CP 20-21.

There was no suggestion that Mr. Foley contacted her or posted any videos after May. CP 17-31. Police spoke with her toward the end of November 2019 but did not make note of any new contact from Mr. Foley. CP 91.

Stale information cannot establish probable cause. *Lyons*, 174 Wn.2d at 359-363. When assessing staleness, courts consider the time elapsed since the known criminal activity and "the nature and scope of the suspected activity." *State v. Lyons*, 174 Wn.2d 354, 361, 275 P.3d 314 (2012); *see also United States v. Zimmerman*, 277 F.3d 426, 434 (3d Cir. 2002).

Here, more than seven months elapsed between the alleged criminal activity and the issuance of the search warrant. CP 17-33. During that time, Mr. Foley had no contact with Richardson, and there was no allegation that he'd engaged in cyberstalking. CP 17-33, 91. Furthermore, nothing suggested that he'd inappropriately shared additional images with anyone during those seven months. CP 20-31, 91.

Given the nature of the evidence sought, the information that allegedly justified the search was stale. *See Zimmerman*, 277 F.3d at 434. Mr. Foley may have upgraded his phone to a newer model during that time, while using the same phone number. The police did not use the IMEI to confirm that Mr. Foley continued to use the phone he'd used in May. CP 91.

Furthermore, even if he had kept his phone, the affidavit did not show that he had reason to save information related to the allegations. Nor is there any information showing that he *did* save such information. He had no contact with Richardson and did not post any new images. CP 20-31, 91.

Information obtained in May did not provide probable cause to search Mr. Foley's phone in December. *Id.* Nothing suggests upload of a high volume of illegal activity over a prolonged period. CP 20-33. There is no reason to think that evidence would be found on the phone more than seven months after the alleged offenses.

The affidavit does not "provide sufficient support for the magistrate's finding of *timely* probable cause." *Lyons*, 174 Wn.2d at 368 (emphasis added).

4. Geolocation and geofencing data.

Respondent argues that probable cause established the need to search for geolocation and geofencing data. Respondent's Brief, p. 22, 29. According to Respondent, "it is reasonable to infer that [Mr. Foley] may use other electronic means" to harass Richards. Brief of Respondent, p. 22.

Respondent is apparently referring to "tracking apps," which a person could use to track another's movements. Respondent's Brief, p. 22. But the warrant referred to "*any* application being used for location sharing and/or geo-fencing." CP 17.

This would include any apps on Mr. Foley's phone that tracked *his* location. The list of such apps is long. *See* Appellant's Opening Brief, pp. 26-27. The warrant did not limit the officers' search to apps that a person could use to track another.[3]

Respondent suggests that the location/geofencing provision can be severed from the remainder of the warrant. Brief of Respondent, p. 19, 22, 23. But Respondent does not

[3] Furthermore, there was no evidence that Mr. Foley had ever attempted to track Richardson's location by any means.

examine the factors governing severability. *See State v. Gudgell*, 20 Wn.App.2d 162, 180, 499 P.3d 229 (2021).

A warrant may not be severed unless five requirements are met: "(1) the warrant must lawfully have authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the part of the warrant that includes particularly described items supported by probable cause must be significant compared to the warrant as a whole; (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant; and (5) the officers must not have conducted a general search in flagrant disregard of the warrant's scope." *Id.*, at 180-181.

Here, the first three factors do not support severance. As argued in the opening brief,[4] few (if any) items listed in the warrant are particularly described and supported by probable cause. Appellant's Opening Brief, pp. 15-46.

Furthermore, the State has not established that the fourth and fifth factors support severance. At the State's urging, the

[4] And elsewhere in this brief.

court declined Mr. Foley's request to hold a hearing on the execution of the warrant. Had the court held a hearing, the State would have had the opportunity to address the fourth and fifth factors.

The prosecution could have produced evidence establishing how the search was conducted and whether officers found the data "while executing [a] valid part of the warrant." *Id.* The State could also have shown whether the officers "conducted a general search in flagrant disregard of the warrant's scope." *Id.*

The State has not shown that the warrant is severable. There was no probable cause supporting a request to search for location/geofencing data. Appellant's Opening Brief, pp. 26-29. The lack of probable cause and the inapplicability of the severance doctrine requires suppression of all the evidence seized from the phone.

B. Both search warrants were insufficiently particular.

Description of the phone. A description must be "as specific as the circumstances… permit[]. *State v. Perrone*, 119 Wn.2d 538, 547, 834 P.2d 611 (1992). A "generic or general

description may be sufficient, if probable cause is shown and a more specific description is *impossible*." *Id.* (emphasis added).

Furthermore, where material protected by the First Amendment are concerned, the particularity requirement must be accorded the most scrupulous exactitude. *Perrone*, 119 Wn.2d at 548

Here, the description of the phone was not "as specific as the circumstances… permit[]." *Perrone*, 119 Wn.2d at 547. A more specific description of the phone was not "impossible." *Id*..

First, police had obtained the IMEI of the phone prior to applying for the warrant. The warrant did not use the IMEI to describe the phone. CP 17.

Second, police could have used the IMEI to determine the brand and model of the phone they sought. They did not do so and did not describe the brand or model in the warrant. CP 17-33.

Third, Richardson provided police a description the phone Mr. Foley had used in March. CP 91. This description does not appear in the warrant. CP 17.

Because a more specific description was not "impossible," the warrant failed the particularity requirement as to the phone. *Id.;* Appellant's Opening Brief, p. 34-36.

In its brief, Respondent makes no mention of the phone's IMEI or Richardson's description of the phone. Nor does Respondent address the "impossibility" standard set forth in *Perrone.*

Instead, Respondent implies that a search warrant need not be particular if the executing officers seize the item they are looking for. Respondent's Brief, p. 27. This *post-hoc* justification eviscerates the particularity requirement.

The warrant itself must describe things with particularity. The manner of execution does not retroactively affect the scope of the warrant: "an overbroad warrant is invalid whether or not the executing officer abused his discretion." *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

The description of the phone was insufficiently particular. This requires suppression of the phone and all the information it contained.

The warrant's description of the information sought. Among other things, the first warrant authorized a search for "internet history," "videos and images of [Richardson and Jones]," and "any application being used for location sharing and/or geofencing." CP 17. In addition, both warrants listed "data indicating dominion and control." CP 17, 85. No limitations were placed on any of these categories. CP 17, 85.

The reference to "internet history" allowed police to examine all of Mr. Foley's activity. It did not limit the search to any particular subject or to any definite time period. CP 17; Appellant's Opening Brief, p. 35-42. A more specific description was not "impossible." *Id.*

The warrant should have limited the officers' authority to explore Mr. Foley's "internet history." It was insufficiently precise to meet the particularity requirement.

The first warrant authorized police to search for and seize any "videos and images" of Richardson and Jones, including videos and images that were non-sexual in nature. CP 17. It did not impose any temporal restriction or other parameters that

might limit the search. CP 17. This description was insufficiently particular.

The authorization to search any application that uses location sharing or geofencing was broad enough to allow a search through numerous apps that use that data. Nothing in the warrant application justified this.[5] The term was insufficiently particular. CP 17. *Id.*

The warrant also authorized a search for evidence of dominion and control. Police are generally permitted to search for and seize evidence of dominion control. However, where cell phones are concerned, an authorization should be framed carefully to ensure that the particularity requirement is accorded the most scrupulous exactitude. *Perrone*, 119 Wn.2d at 548.

Here, both warrants authorized police to search for "any data indicating dominion and control." CP 17, 85. There were no limitations. CP 17, 85. This transformed the search into an unlawful general warrant, especially in light of the rule that the particularity requirement be accorded the most scrupulous exactitude. *Id.; see Stanford v. State of Tex.*, 379 U.S. 476, 486,

[5] Furthermore, this search term was not supported by any information in the warrant affidavit.

85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). It was insufficiently particular.

Absence of temporal restrictions. None of the terms of the warrant[6] limited the data sought to any timeframe. It would not have been "impossible" to impose a temporal restriction. *Perrone*, 119 Wn.2d at 547.

According to Respondent, no temporal restriction was possible because Mr. Foley "may have engaged" in crimes other than those described in the affidavit. Respondent's Brief, p. 28. But a search warrant may not rest on unspecified crimes that a person "may have engaged" in. If there is probable cause for those crimes, it must be set forth; if there is no probable cause, the warrant cannot issue.

References to the crime under investigation. A particularity problem is not cured by referring to the crime under investigation. *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015). Naming a crime and citing the statute does not "add any actual information that would be helpful to the reader." *Id.* Only if the language of the statute or statutory definitions are

[6] Apart from the reference to Facebook messenger in the first warrant. CP 17.

included will references to the crime support the particularity requirement.

In this case, the first warrant suffered from the same problem described in *Besola*. Naming the crime and citing the statute did not "add any actual information that would be helpful to the reader." *Id.*

Respondent does not contend otherwise. Indeed, according to Respondent, "the reference to cyberstalking is superfluous." Respondent's Brief, p. 10.

The first warrant said the materials sought were "related to RCW 9.61.260 Cyberstalking & RCW 9A.86.010 Disclosing intimate images." CP 17. This language did not limit the evidence to be seized; instead it "merely says that the evidence… is '[related]' to" the charges under investigation. *Id.,* at 615 (alteration added).

The first warrant could have used statutory language and definitions to describe the materials sought. *Id.,* at 613. This may have cured a lack of particularity. However, the warrant did not use the language of the statute. CP 17.

The first warrant was overbroad. Mr. Foley's convictions must be reversed, and the evidence suppressed.

III. THE TRIAL COURT SHOULD HAVE ASSESSED THE VALIDITY OF THE WARRANT'S EXECUTION.

When Mr. Foley challenged the execution of the warrant, the court declined to hold a hearing or rule on his argument. This is so even though the mere existence of a warrant "does not necessarily make a search lawful." *State v. Anderson*, 105 Wn.App. 223, 231, 19 P.3d 1094 (2001).

The Washington constitution's protection of private affairs imposes a greater burden on the State than does the federal constitution. Wash. Const. art. I, §7. The State must establish "authority of law" to justify an intrusion into a person's "private affairs." Wash. Const. art. I, §7.

A search warrant can provide that authority. However, a search that exceeds the scope of a warrant is not made pursuant to the authority provided by that warrant. Under our state constitution, the prosecution bears the burden of proving that the warrant was validly executed.[7] This is so because the

[7] By contrast, the defendant bears the initial burden of

(Continued)

burden is on the government to show that it had the requisite "authority of law" to conduct the search. Showing the existence of a warrant is insufficient where the defendant challenges execution of the warrant.

Here, Mr. Foley argued that the execution of the warrant violated his rights under Wash. Const. art. I, §7. CP 13, 105-108, 168, 218, 220, 226, 228, 230-232; RP (8/3/20) 3-4, 10, 45; RP (8/21/20) 3-6, 8, 14-15; RP (10/9/20) 3-5. The court should have entertained this argument. Appellant's Opening Brief, pp. 46-51. It should have required the State to produce evidence showing that the warrant was properly executed. Appellant's Opening Brief, pp. 46-51.

Respondent claims that Mr. Foley bears the burden of producing prima facie evidence showing improper execution of the warrant. Respondent's Brief, pp. 32-35. Respondent's argument is based on a federal case addressing Fourth Amendment law.[8] Respondent's Brief, pp. 32-33 (citing *Zuniga-Perez v. Sessions*, 897 F.3d 114, 123 (2d Cir. 2018)).

challenging the legitimacy of the warrant itself. *See, e.g., State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

[8] Mr. Foley cited *Zuniga-Perez* for the proposition that exceeding (Continued)

But the federal standard should not apply. Mr. Foley's argument rests on the greater protections of Wash. Const. art. I, §7. Appellant's Opening Brief, p. 47-49. Under the state constitution, a search must rest on "authority of law." Wash. Const. art. I, §7. A search that exceeds the scope of a warrant is an invasion of private affairs made without such authority. Appellant's Opening Brief, pp. 46-51.

The State failed to prove that the officers stayed within the limits set by the warrant, Mr. Foley's convictions must be reversed, and the evidence suppressed.

IV. THE SECOND SEARCH WARRANT WAS TAINTED BY PRIOR UNCONSTITUTIONAL SEARCHES AND SEIZURES.

Respondent concedes that any infirmity in the first warrant taints the second warrant. Respondent's Brief, pp. 35-36.

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the scope of a warrant is "akin to acting without a warrant at all." *Zuniga-Perez*, 897 F.3d at 123. This is not to imply that Fourth Amendment law should apply to violations of Art. I, §7.

V. THE TRIAL COURT VIOLATED MR. FOLEY'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

Dismissal "without prejudice." The trial court dismissed three counts under double jeopardy principles. CP 384. The "Order of Dismissal" reflects that they were dismissed "without prejudice." CP 384.

It was proper for the court to order dismissal. However, it was improper to include the language "without prejudice." *State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). Where double jeopardy requires vacation of a conviction, the court may not "direct[], in some form or another, that the conviction nonetheless remains valid." *Id.*

Respondent's only argument is that dismissal without prejudice is not appealable or subject to discretionary review. Respondent's Brief, pp. 36-37. This reflects a misunderstanding of Mr. Foley's argument.

Appellant is not seeking review of the dismissal or arguing that it should have been with prejudice. The error is in the notation on the order that the dismissal was "without prejudice." CP 384. To correct this error, the language "without

prejudice" must be stricken. Appellant's Opening Brief, pp. 55-57.

Unit of prosecution. The unit of prosecution for second-degree possession of child pornography is "each incident of possession." RCW 9.68A.070(2)(c). This contrasts with the unit of prosecution for first-degree possession, which rests on each image possessed. RCW 9.68A.070(1)(c).

Mr. Foley had a single "incident of possession." RCW 9.68A.070(2)(c). He was punished for that single incident of possession when he was convicted of and sentenced for seven counts of first-degree possession.

Because he had already been punished for his single "incident of possession," he should not have been sentenced for second-degree possession based on the same incident. Appellant's Opening Brief, pp. 57-59.

Other than quoting the statute, Respondent makes no argument regarding the unit of prosecution. Respondent's Brief, pp. 38-40. The balance of Respondent's argument focuses on whether the offenses are the same in law and fact. Respondent's Brief, p. 40 (citing *State v. Gocken*, 127 Wn.2d 95, 896 P.2d

1267 (1995) and *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). This analysis—the "same elements" test—does not apply to double jeopardy claims regarding the unit of prosecution.

Because Mr. Foley was punished for a single incident of possession, he cannot be punished a second time based on that same incident of possession. Appellant's Opening Brief, pp. 57-60. The conviction for second-degree possession of child pornography must be vacated.

VI. THE SENTENCING COURT IMPOSED UNLAWFUL COMMUNITY CUSTODY CONDITIONS.

"Sexually exploitive [sic] materials." Respondent concedes that this term is "vague as written." Respondent's Brief, p. 44. The case must be remanded, allowing the trial court to either strike or clarify the provision.

"Sexually explicit materials." This condition is overbroad.[9] Appellant's Opening Brief, pp. 65-67; *see State v. Johnson*, 4 Wn.App.2d 352, 358, 421 P.3d 969 (2018).

[9] The condition is likely crime-related, as Respondent argues. Respondent's Brief, pp. 46-47. Appellant erroneously suggested that it was not. Appellant's Opening Brief, pp. 65-67.

Respondent defends the prohibition, citing *State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018). Respondent's Brief, pp. 46-47. But *Nguyen* did not involve an overbreadth challenge.

The provision is overbroad and must be stricken.

"Information pertaining to minors." The court did not place any limitations on the prohibition against **"**information pertaining to minors" accessed "via computer (i.e. internet)." CP 411. The term is vague, overbroad, and not crime-related. Appellant's Opening Brief, pp. 67-69; *State v. Eckles*, 195 Wn.App. 1044 (2016) (unpublished).

It goes far beyond what is even remotely tied to protecting children. *Id.* It "could cover a broad spectrum of information," including, for example, "a news article related to a disease outbreak among children." *Id.* The provision was not "sensitively imposed in a manner that is reasonably necessary to accomplish essential state needs and public order." *Johnson*, 4 Wn.App.2d at 358 (internal quotation marks and citation omitted).

Breath tests. Respondent concedes that the breath test provision should be stricken. Respondent's Brief, p. 48.

CCO treatment recommendations. Mr. Foley's CCO should not be permitted to require Mr. Foley to complete treatment that is not recommended by any provider. Appellant's Opening Brief, p. 70-72. Respondent apparently agrees but contends that the Judgment and Sentence "sufficiently cabin[s] the CCO's discretion to matters following from the results of appropriate evaluations." Respondent's Brief, p. 50.

The case should be remanded to make this restriction explicit.

VII. THE COURT OF APPEALS SHOULD STRIKE THE CLERICAL ERROR DIRECTING MR. FOLEY TO PAY THE COSTS OF SUPERVISION.

Respondent concedes that the provision should be stricken. Brief of Respondent, p. 51.

CONCLUSION

Police illegally obtained evidence that was used against Mr. Foley at trial. The evidence must be suppressed, and the charges dismissed.

In the alternative, the case must be remanded to correct double jeopardy errors, vacate or clarify improper community custody provisions, and strike the provision requiring Mr. Foley to pay the costs of supervision.

Respectfully submitted on July 22, 2022,

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CERTIFICATE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4666 words, as calculated by our word processing software.

I certify that on today's date, I mailed a copy of this document to:

Timothy Foley, DOC #429140
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on July 22, 2022.

_____
Jodi R. Backlund, No. 22917
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BACKLUND & MISTRY

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